No. 77-1260

In the Supreme Court of the United States

OCTOBER TERM, 1977

LESLIE ATKINSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 565 F.2d 1283.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1977. A petition for rehearing and rehearing *en banc* was denied on January 16, 1978.

Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including March 17, 1978, and the petition was filed on March 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were prejudiced by their joint representation at trial.

2. Whether petitioners' convictions must be reversed because the trial court did not, *sua sponte*, inquire into the possibility of conflict flowing from the joint representation.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, all eight petitioners were convicted of conspiring to import heroin into the United States, in violation of 21 U.S.C. 963. In addition, petitioners Leslie Atkinson, Sharon Atkinson Arrington, and Michael Arrington were convicted of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioners were sentenced to various terms of imprisonment, fines, and terms of special parole.[1] The court of appeals affirmed (Pet. App. 1a-6a).

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[1] Petitioner Leslie Atkinson was sentenced to imprisonment for a total of 25 years, that term to run consecutively to a 19-year sentence he was then serving. He was also fined a total of $50,000 and given a special parole term of nine years (XIV Tr. 38-39). Petitioners Michael and Sharon Arrington were each sentenced to 15 years' imprisonment, fines totalling $50,000, and special parole terms of six years. Petitioner William Thomas was sentenced to 15 years' imprisonment, a fine of $25,000, and a special parole term of three years (XIV Tr. 61). The other petitioners were each sentenced to 10 years' imprisonment, three years' special parole, and fines ranging from $5,000 to $25,000 (XIV Tr. 47-98).

The evidence established that between August 1974 and March 1976 petitioners, together with nine other individuals, conspired to import heroin into the United States from Thailand. Freddie Lee Thornton, the chief prosecution witness at trial, testified that in February 1974, while stationed in Thailand as a technical sergeant in the United States Air Force, he discussed with petitioner Atkinson and co-defendant James Smedley the possibility of participating in a narcotics smuggling operation (II Tr. 243-249, 262-265).[2] Thornton's direct involvement in the operation began in August 1974, when he transported two pieces of luggage containing heroin from Thailand to the United States on Smedley's instructions. Upon his arrival in the United States, Thornton met with petitioner Atkinson, who paid him $5,000 for the heroin (II Tr. 265-284).

After his return to Thailand in September 1974, Thornton played an even more active role in the smuggling operation (II Tr. 288-297). By February 1975, when Thornton again left Thailand, the group

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[2] "Tr." preceded by a Roman numeral designates one of the 14 numbered volumes of the trial transcript.

had succeeded in smuggling several more shipments of heroin into the United States. (II Tr. 297-315).[3]

Upon his return to the United States, Thornton retrieved two of the previously shipped pieces of luggage containing heroin and then traveled to North Carolina, where he delivered the heroin to Atkinson in exchange for $12,000 in cash (II Tr. 325-331). The next month, Thornton returned to California at Atkinson's behest. There he and petitioner Thomas claimed a shipment of furniture from Southeast Asia that contained drugs concealed in false-bottomed drawers. Thornton supervised the removal of the heroin and again delivered it to Atkinson, who paid him $15,000 for the drugs (II Tr. 333-353; III Tr. 120-125).[4]

In May 1975, Atkinson sent Thornton back to Thailand to oversee a number of continuing drug-smuggling projects in that country. Among these projects was a proposed scheme involving petitioner Martin, who agreed to help ship the drugs from Thailand in "military cargo" packages in order to

[3] A companion scheme, arranged by petitioners Atkinson and Jennings and employing individuals to transport contraband to the United States concealed in their luggage, was thwarted by federal narcotics agents (V Tr. 156-166, 181-187; VIII Tr. 35-36, 46-47). The evidence also showed that petitioner McArthur was actively involved in yet another phase of the smuggling scheme, shipping packages of contraband to the United States with the cooperation of an Air Force postal service supervisor (VI Tr. 18-36).

[4] This transaction was the basis of the substantive possession count against petitioner Atkinson.

avoid customs checks (II Tr. 354-365). Thornton obtained a large amount of heroin in Thailand with the assistance of petitioner Martin and began arranging to ship it to the United States. During the summer of 1975, however, Thornton became concerned about disunity among his associates there (II Tr. 400-405). Accordingly, he returned to the United States in July to discuss the matter with Atkinson.

At about that time, Atkinson was convicted, on his *nolo contendere* plea, of various drug offenses and was incarcerated in the Atlanta Federal Penitentiary. At Atkinson's home, Thornton met with Atkinson's daughter, petitioner Sharon Atkinson Arrington. According to Thornton, Sharon was handling her father's affairs while Atkinson was in prison. Thornton told Sharon that he had misgivings about some of his associates in the Thailand operation. She suggested that he express his concern in writing, and she promised to deliver Thornton's letter to her father. Thornton followed her suggestion and wrote the letter. He returned later, and in the presence of her husband, petitioner Michael Arrington, Sharon relayed a return message from Atkinson, in which Atkinson directed Thornton to assume control of the entire smuggling operation (II Tr. 431-442).

Upon his return to Thailand, Thornton was arrested by federal narcotics agents and deported to the United States (II Tr. 442-448). To obtain his release, Thornton feigned cooperation with the government by providing a federal grand jury with minimal and par-

tially false information concerning his participation in the drug smuggling operation (II Tr. 448-450). Thornton then returned to North Carolina, where he again met with petitioners Sharon and Michael Arrington. Sharon told him that petitioner Brown had notified her that another shipment of heroin-laden furniture had arrived from Thailand, but she added that her father had warned that the furniture should not be picked up until things "cooled off" (II Tr. 450-454, 475-477). Despite the warning, Thornton decided to pick up the heroin. Accordingly, he made the necessary arrangements with Brown, and the two of them removed the heroin from the furniture. Thornton delivered it to Sharon and Michael Arrington, and Sharon paid him $40,000 for the delivery (II Tr. 481-507).[5]

After that delivery, Thornton was again arrested by DEA agents. An indictment was subsequently returned charging a total of 17 persons, including the eight petitioners, with conspiring to import heroin. Three of the 17 were named as unindicted coconspirators, two remained in custody in Thailand, and two, including Thornton, pleaded guilty and testified for the government.

The same retained attorney, Stephen H. Nimocks, represented all eight petitioners at arraignment. In subsequent proceedings, Nimocks continued to appear

[5] This transaction formed the basis of the substantive possession count against petitioners Sharon and Michael Arrington.

on behalf of petitioners Atkinson and McArthur, while other retained attorneys provided representation for the remaining petitioners as follows: James C. MacRae served as counsel for Sharon and Michael Arrington; Bobby G. Deaver represented Monroe Martin and defendant Charles Gillis; and Anthony E. Rand represented William Thomas, Rudolph Jennings, and William Brown (Pet. App. 3a-4a). All eight petitioners and defendant Charles Gillis were convicted by the jury.[6] Defendant William King Wright was acquitted.

Prior to trial, the district court was not requested to conduct, and did not conduct, a hearing to determine whether the dual representation might lead to a conflict of interest on the part of any of the attorneys representing more than one defendant. In affirming petitioners' convictions, the court of appeals held (Pet. App. 5a) that it could discern "no conflict of interest or resultant prejudice to any of the [petitioners]." Accordingly, the court rejected petitioners' contention that the various joint representations denied them the effective assistance of counsel.

ARGUMENT

Petitioners contend that they were prejudiced by conflicts of interest that resulted from the various joint representations at trial and that in any event their convictions should be reversed because the trial

[6] Defendant Gillis did not appeal his conviction.

court failed, *sua sponte*, to inquire into the possibility that conflicts of interest might develop at trial. On the facts of this case, neither claim warrants review.

1. As this Court has recently stated, joint representation "is not *per se* violative of constitutional guarantees of effective assistance of counsel. * * * [I]ndeed, in some cases, certain advantages might accrue from joint representation." *Holloway* v. *Arkansas*, No. 76-5856, decided April 3, 1978, slip op. 7. Although the courts ordinarily infer prejudice from the existence of a conflict, a conflict is not automatically inferred from the fact of joint representation. *United States* v. *Foster*, 469 F.2d 1, 4 (C.A. 1).

As petitioners correctly note, the courts of appeals differ in the verbal formulation of the standard to be used to determine whether jointly represented defendants have suffered prejudice because of an apparent conflict of interest on the part of their attorney, when the claim is raised for the first time on appeal.[7] The Fourth Circuit in the instant case adopted the standard enunciated by the Second Circuit in *United States* v. *Lovano*, 420 F.2d 769, 773, certiorari denied, 397 U.S. 1071, that "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist" (Pet. App. 5a). Although the different formulations may reflect differences in language rather than differences in result in similar cases, the standard adopted by the court of appeals in this case appears to be at least as exacting as that applied by any other court except perhaps the Third Circuit. Compare *United States* v. *Huntley*, 535 F.2d 1400, 1406 (C.A. 5), certiorari denied, 430 U.S. 929 (requiring demonstration of an "actual, significant" conflict); *United States* v. *Williams*, 429 F.2d 158, 161 (C.A. 8), certiorari denied, 400 U.S. 947 (requiring "evidence of an actual conflict of interest or evidence pointing to a substantial possibility of a conflict of interest between the codefendants"); and *United States* v. *Mandell*, 525 F.2d 671, 677 (C.A. 7), certiorari denied, 423 U.S. 1049 (requiring a showing "with a reasonable degree of specificity, that a conflict of interests actually existed at trial"), with *United States ex rel. Hart* v. *Davenport*, 478 F.2d 203, 210 (C.A. 3) (referring to some "showing of a possible conflict of interest or prejudice, however remote"). There is no reason, however, to decide upon the proper verbal formula in this case, since petitioners have failed to show prejudice here under any test.

Close scrutiny of the various petitioners' claims of prejudice demonstrates that the claims are insubstantial:

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[7] The standards adopted by other circuits that have analyzed the problem are set forth in our Brief in Opposition in *Hurst* v. *United States*, No. 77-5157, certiorari denied, April 17, 1978, pp. 5-6, a copy of which we are providing petitioners' counsel.

This case is of course wholly unlike *Holloway*, where appointed counsel raised a colorable claim of conflict of interest prior to the trial.

a. Petitioner Michael Arrington contends (Pet. 33-34) that he was prejudiced by the fact that his wife, petitioner Sharon Arrington, with whom he was jointly represented, testified at trial while he did not. But Sharon Arrington's testimony was entirely consistent with the defense of both that they were in no way involved in the conspiracy. To the extent that her testimony corroborated the accounts of government witnesses, it did so only as to those matters that had been established by independent documentary proof, and as to which any denial on her part would have been incredible. In any event, her admissions on these points were helpful rather than prejudicial to her husband.

Sharon Arrington admitted, for example, that she and her husband had traveled to Atlanta to see her imprisoned father, but she maintained that the purpose of the visit was innocent and that neither she nor her husband knew what was in the letter she took to her father at Thornton's request (IX Tr. 14-18). The prosecution introduced the prison visitors log, which contained entries for both Arringtons (V Tr. 86), so her effort to give an innocent explanation for the visit bolstered her husband's defense rather than further incriminating him.

Similarly, on cross-examination Sharon admitted that her husband received a call from petitioner McArthur (IX Tr. 36-38), but she denied that in the course of that conversation McArthur told her husband that the Brown furniture shipment had arrived

from Thailand (IX Tr. 37). The government proved that such a telephone call had been made by introducing telephone company records listing calls between McArthur's furniture company and the Arringtons' residence (V Tr. 49-56). In addition, McArthur testified that the call was made and that he spoke with Michael Arrington (XI Tr. 39-40). Accordingly, Sharon's testimony was as helpful to her husband as it could possibly have been under the circumstances.

Petitioner Michael Arrington's claim of prejudice is not in any way buttressed by the fact that his wife took the stand while he did not. Any inference that the jury may draw from the fact that one defendant declines to take the stand in a multi-defendant trial is subject to correction by the court's instruction. See *Lakeside* v. *Oregon*, No. 76-6942, decided March 22, 1978. The danger that such an inference will be drawn in spite of a proper instruction is in no way enhanced by the fact that two defendants are represented by the same attorney.[8]

Nor is there any substance to the related assertion (Pet. 34) that petitioner Michael Arrington was foreclosed by the dual representation from presenting a

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[8] The case of *United States* v. *DeBerry*, 487 F.2d 448 (C.A. 2), upon which petitioners rely, is entirely inapposite, since in that case the testifying defendant directly inculpated the non-testifying defendant. The court concluded that the joint representation of two defendants in that situation was improper, since a single attorney was in the position of overseeing the direct incrimination of one client by the other.

defense of non-participation. His wife presented that very defense in her testimony. Indeed, she was careful to extend her denials to cover her husband as well as herself (IX Tr. 37, 42, 50), so that he derived the benefit of her presentation of their joint defense without having to undergo cross-examination.

Finally, the summation given by the Arringtons' attorney cannot fairly be interpreted, as petitioner Michael Arrington maintains, as an effort to "[give] up Michael in an attempt to save Sharon" (Pet. 34). The transcript (XIII Tr. 45-57) shows that counsel argued that his clients were equally uninvolved in the conspiracy; his attack upon the credibility of the government's witnesses clearly encompassed both Arringtons; and his brief discussion of the evidence (XIII Tr. 51-52) did not in any way reflect a sacrifice of one of his clients in favor of the other.

b. Petitioner Sharon Arrington claims prejudice as a result of the joint representation with her husband (Pet. 36-37). As we have just discussed, that joint representation led to no conflict. Although the petition states, without elaboration, that the two Arringtons had "divergent interests" at trial (Pet. 36), their interests, in fact, were virtually identical. Both petitioners sought to discredit Thornton, and both relied on the consistent defense of non-participation. Neither Michael Arrington nor their joint counsel at any time attempted either to contradict Sharon's testimony or to shift any blame onto her.

Sharon Arrington further complains (Pet. 37) that her attorney cross-examined witnesses who failed to inculpate either her or her husband. From this she concludes that her attorney was "apparently acting in the interest of her father [petitioner Atkinson]" (*ibid.*). In fact, however, protecting Atkinson—whom he did not represent—was not the only motive for the Arrington's attorney to attack those government witnesses who did not directly inculpate the Arringtons. Several of those witnesses significantly corroborated Thornton's account of the conspiracy. Breaking down the corroborating witnesses would have tended to cast doubt on Thornton's testimony. Since Thornton directly incriminated both Arringtons, it was obviously in their interest for counsel to do everything that could be done to undermine Thornton. Indeed, counsel's questions were often designed to disclose that the government witnesses had received something in return for their testimony, thereby discrediting the government's case generally and Thornton in particular.[9] The attempts to discredit Thornton through cross-examination of other witnesses was plainly a proper defense strategy; beyond making a general assertion of prejudice, the petition fails to show how

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[9] The cross-examination of Drug Enforcement Administration Agent Lionel Stewart (VII Tr. 14-15), for example, related to earlier cross-examination of Thornton (II Tr. 645-652), which focused on the agreement made with Thornton in exchange for his testimony.

this strategy was in any way contrary to Sharon Arrington's interest. In any event, it has nothing to do with the fact that the Arringtons were represented by a single attorney.

c. Petitioner Leslie Atkinson complains (Pet. 34-36) that he was prejudiced by his joint representation with petitioner McArthur. The basis of this claim is simply that Atkinson neither testified nor presented a defense at trial, while McArthur chose to testify in his own behalf. The petition suggests that Atkinson could have pursued the defense that he had divorced himself from illegal narcotics operations following his drug conviction in 1975, but that his attorney declined to pursue that defense. The attorney did so, it is claimed, in order to avoid the possibility of implicating McArthur in Thornton's later smuggling ventures. This claim is purely speculative and finds no support in the record.

The far more reasonable explanation of Atkinson's failure to testify stems from the fact that Atkinson would have been an extraordinarily vulnerable witness in light of his *nolo contendere* plea and conviction for drug smuggling activities. The fact of the matter is that the evidence against petitioner Atkinson was so overwhelming that his only hope for acquittal lay in a frontal assault on the credibility of each of the government's witnesses, a tack that his lawyer adopted, along with the other defense counsel in this case. The fact that this approach proved fruitless has less to do with any possibility of conflict than with the strength of the government's case against him. To the extent that petitioner Atkinson's complaint is that his counsel did not adopt the most promising trial strategy, the First Circuit has provided an apt answer in a similar joint representation context: "The possibility here that another approach might have been used, with better results for the defendant, exists in every case and is very far indeed from making out a deprivation of constitutional right." *United States* v. *Foster*, 469 F.2d 1, 4 (C.A. 1).

d. Petitioner James McArthur argues (Pet. 37-38) that his defense was prejudiced by virtue of his joint representation with petitioner Atkinson. He asserts, first, that his attorney was primarily concerned with representing Atkinson and that his defense "and other possible courses of action were limited" (Pet. 37). Second, he claims that "through association by common counsel, McArthur was inextricably bound to the evidence, fortunes and fate of Atkinson" (Pet. 37-38) even though the evidence against him was less imposing than that against Atkinson. In fact, however, McArthur and Atkinson were linked to the same facet of the importation operation through the testimony of Herbert Houseton (VI Tr. 15-35). When Houseton related that Atkinson had urged him to replace McArthur as a key member of the venture—thus directly implicating

both—the only plausible defense available to both petitioners was precisely the same: to establish that Houseton's account was fabricated or inaccurate.

McArthur's reliance on *United States ex rel. Horta* v. *DeYoung*, 523 F.2d 807 (C.A. 3), is misplaced. In that case, the court noted that joint counsel for all three defendants had failed to pursue a plausible defense strategy for one defendant that would have involved the risk of further incriminating the other two. The court therefore found that there was possible prejudice resulting from the joint representation. McArthur's posture is closer to that of the defendants in *United States* v. *Mandell*, 525 F.2d 671, 677-678 (C.A. 7), certiorari denied, 423 U.S. 1049, where although there may have existed differing shades of culpability, there was no suggestion that the difference resulted in inconsistency in the defenses that were or could have been put forth. McArthur fails to indicate how separate representation might have made a difference in his choice of defense strategy or how his position could otherwise have been separated to his advantage from that of Atkinson.[10] Absent such a showing, he is entitled to no relief.

[10] McArthur contends (Pet. 38) this his attorney's cross-examination of certain witnesses was improper. Significantly, he does not contend that because of the joint representation his attorney failed to cross-examine witnesses who incriminated him, as was the case in *Craig* v. *United States*, 217 F.2d 355, 359 (C.A. 6). Instead, he argues that his attorney cross-examined witnesses who incriminated only Atkinson, and whom separate counsel would not have found it necessary to cross-examine at all. Yet he does not in any way suggest how this cross-examination prejudiced his defense, entitling him to a new trial.

e. Petitioners William Thomas, Rudolph Jennings, and William Brown were represented at trial by the same attorney. Thomas failed to take the witness stand in his own behalf, and the other two now urge (Pet. 38-39) that adequate presentation of their defense was "severely constrained" by Thomas's failure to testify.

Petitioners Jennings and Brown claim (Pet. 39) that they were prejudiced by their attorney's failure to call petitioner Thomas as a witness to support their theories of defense. Even if Thomas had been separately represented, however, the other two defendants could not have called him to the stand. A defendant cannot be compelled to testify by a co-defendant any more than he can by the government. See *United States* v. *Tuley*, 546 F.2d 1264, 1268-1269 n.7 (C.A. 5), certiorari denied, No. 76-6380, October 3, 1977; *United States* v. *Harris*, 542 F.2d 1283, 1298 (C.A. 7, certiorari denied *sub nom. Clay* v. *United States*, 430 U.S. 934; *United States* v. *Johnson*, 488 F.2d 1206, 1211 (C.A. 1); *Bowles* v. *United States*, 439 F.2d 536 (C.A.D.C.), certiorari denied, 401 U.S. 995. Thomas's unavailability as a witness was thus not attributable to the joint representation at all.[11]

[11] Petitioners appear to concede (Pet. 39) that it would have been damaging to Thomas's defense for him to take the stand. In any event, there is no contention that he might have aided his cause by testifying, and that a separate attorney might have advised him to take the stand.

f. Finally, petitioner Monroe Martin, who was jointly represented with defendant Charles Gillis, contends (Pet. 39-40) that he was prejudiced because Gillis was not cross-examined to corroborate Martin's denial that he agreed with Patterson and Atkinson to mail narcotics labeled as military cargo to the United States. Gillis was not cross-examined on that issue simply because he was not involved in that operation. The scheme, which was never effectuated, centered around the activities of petitioner Martin and co-defendant Patterson at military mail facilities in Thailand and the United States.

In sum, petitioners have failed to show that the joint representations in this case led to any prejudicial conflicts of interest on the part of any of their attorneys. There was no divergence in defense strategies by any of the defendants, nor have petitioners suggested any way in which a conflicting theory of defense might have helped any of them.[12]

2. Petitioners' alternate contention is that failure of the trial court to inquire *sua sponte* into the possibility of prejudice constituted reversible error (Pet. 27-32). There is, as petitioners assert, a divergence among the courts of appeals regarding the duty of the trial court to ascertain whether a conflict of interest

[12] Because the court of appeals found no indication of prejudice in the joint representations, it did not have to address the question of which side bears the burden of proof on the issue of prejudice (Pet. 40-42). For the same reason, that issue is not appropriate for resolution here.

exists in cases of multiple representation, to advise the defendants of the risks associated with such a defense arrangement, and, if necessary, to obtain a knowing and intelligent waiver of the defendants' right to separate counsel. See *Holloway* v. *Arkansas*, No. 76-5856, decided April 3, 1978, slip op. 8. As we have stated in our brief in opposition in *Hurst* v. *United States*, *supra* (pp. 6-9), we believe such judicial inquiry has substantial value as a prophylactic measure. Yet the absence of such an inquiry does not automatically entitle the defendants to a reversal of their convictions. Reversal is justified only where actual prejudice is shown. As we have discussed above, no such prejudice resulted in this case. Accordingly, the decision of the court of appeals was correct, and further review is unwarranted.[13]

[13] Even if a requirement of pre-trial inquiry in every case should be imposed in the exercise of the supervisory powers of the federal courts, it should be done prospectively. See *United States* v. *Foster*, *supra*, 469 F.2d at 5. Thus, in the absence of a showing of prejudice, petitioners here should not be granted a new trial in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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